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Appellee's Brief 1975-SC-1036

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APPELLEE'S BRIEF

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SUPREME COURT OF KENTUCKY

File No. 75-1036

JAMES R. YOCOM, COMMISSIONER OF
LABOR OF THE COMMONWEALTH OF KENTUCKY
AND CUSTODIAN OF THE SPECIAL FUND,
SUCCESSOR TO GEORGE R. WAGONER,
ACTING COMMISSIONER APPELLANT

VS:

ISAAC LESTER; KENTUCKY CARBON
CORPORATION, and WORKMEN'S
COMPENSATION BOARD APPELLEES

APPEAL FROM PIKE CIRCUIT COURT
HON. REED D. ANDERSON, JUDGE

BRIEF FOR APPELLEE,
KENTUCKY CARBON CORPORATION

FILED

FEB 6 1976

MARTHA LAYNE COLLINS
CLERK
SUPREME COURT

BAIRD AND BAIRD
P. O. Box 351
Pikeville, Kentucky 41501
*Attorneys for Appellee,
Kentucky Carbon Corporation*

This is to certify that pursuant to RCA 1.250 a copy of the within Brief has been served by mail on Hon. Kenneth E. Hollis, Assistant Counsel, Department of Labor, 310 Legal Arts Building, 200 South Seventh Street, Louisville, Kentucky 40202, Attorney for Appellant; on Hon. Kelsey E. Friend, P. O. Box 512, Pikeville, Kentucky, Attorney for Appellee, Isaac Lester; on Hon. William L. Huffman, Director, Workmen's Compensation Board, Frankfort, Kentucky 40601, and on Hon. Reed D. Anderson, Judge, Pike Circuit Court, Pikeville, Kentucky 41501, this the 5 day of February, 1976.

William L. Huffman

*Of Counsel for Appellee,
Kentucky Carbon Corporation* *WHL*

TABLE OF CONTENTS AND AUTHORITIES

Page

COUNTER STATEMENT OF QUESTION PRESENTED.....	iii
-------------------------------------------------	-----

COUNTER STATEMENT OF THE CASE	1-3
-------------------------------------	-----

ARGUMENT.....	4-9
---------------	-----

The Board and Circuit Court did not err in assessing payment for 75% disability benefits against the Special Fund where a claimant for coal worker's pneumoconiosis benefits has worked for more than one coal company and the employer and its mine is a non-resident, except the last employer, and where the evidence as found by the Board shows that claimant's coal worker's pneumoconiosis was not conclusively proven to be the result of his last employment with the resident employer. 4-9

KRS 342.316 (13) (a)..... 4, 5, 7, 8

Crib Diaper Service v. Stanifer,
(Ky.) 436 S.W. 2d 501 6

Inland Steel Company v. E. H. Terry,
(Ky.) 464 S.W. 2d 284 7

KRS 342.316 (4)..... 7, 8

**TABLE OF CONTENTS
AND AUTHORITIES (Continued)**

	Page
CONCLUSION	9
The Opinion and Award of the Board and Judgment of the Circuit Court should be affirmed, and the appeal of the Fund dismissed.....	9

**COUNTER STATEMENT OF
QUESTION PRESENTED**

DID THE BOARD AND CIRCUIT COURT ERR IN ASSESSING PAYMENT FOR 75% DISABILITY BENEFITS AGAINST THE SPECIAL FUND WHERE A CLAIMANT FOR COAL WORKER'S PNEUMOCONIOSIS BENEFITS HAS WORKED FOR MORE THAN ONE COAL COMPANY AND THE EMPLOYER AND ITS MINE IS A NON-RESIDENT, EXCEPT THE LAST EMPLOYER, AND WHERE THE EVIDENCE AS FOUND BY THE BOARD SHOWS THAT CLAIMANT'S COAL WORKER'S PNEUMOCONIOSIS WAS NOT CONCLUSIVELY PROVEN TO BE THE RESULT OF HIS LAST EMPLOYMENT WITH THE RESIDENT EMPLOYER?

The Board and Circuit Court answered this in the negative with which this Appellee agrees.

SUPREME COURT OF KENTUCKY

File No: 75-1036

**JAMES R. YOCOM, COMMISSIONER OF
LABOR OF THE COMMONWEALTH OF KENTUCKY
AND CUSTODIAN OF THE SPECIAL FUND,
SUCCESSOR TO GEORGE R. WAGONER,
ACTING COMMISSIONER APPELLANT**

VS:

**ISAAC LESTER; KENTUCKY CARBON
CORPORATION, and WORKMEN'S
COMPENSATION BOARD APPELLEES**

**APPEAL FROM PIKE CIRCUIT COURT
HON. REED D. ANDERSON, JUDGE**

**BRIEF FOR APPELLEE,
KENTUCKY CARBON CORPORATION**

MAY IT PLEASE THE COURT:

COUNTER STATEMENT OF THE CASE

This is a Workmen's Compensation case in which appellee-claimant, Isaac Lester, filed his claim with the Workmen's Compensation Board on February 20, 1974, seeking total disability benefits

by reason of the occupational disease of coal worker's pneumoconiosis or silicosis. (W. 1-8)¹.

Claimant, age 59, testified that he had worked for thirty years as a coal miner. (W. 18-19). Claimant worked for Buchanan County Coal Corporation, Big Rock, Virginia, from 1943 to 1968 and then worked for appellee, Kentucky Carbon Corporation, Phelps, Kentucky, from 1968 until February 18, 1974. (W. 1-8).

Claimant was continuously exposed to coal dust while working on the tipple for thirty years for both of these employments. (W. 19, 21, 22).

The medical testimony as to whether the claimant had coal worker's pneumoconiosis was conflicting. Four of the six physicians who examined claimant were of the opinion that he did have the disease. Their testimony was that the disease was the result of his entire mining experience. (See depositions of Dr. Boyce Jones, W. 125; and Dr. Paul Odom, W. 46).

1. References to the Board's record will be designated "W"; references to the record of the Pike Circuit Court will be designated "R".

For convenience, appellant, Special Fund, will be referred to as "Fund", and the Workmen's Compensation Board will be referred to as "Board" and appellee, Isaac Lester, will be referred to as "claimant".

By Opinion and Award, dated June 2, 1975, the Board found claimant to be totally disabled by reason of the occupational disease of silicosis/pneumoconiosis arising out of and in the course of his employment as a coal miner. The Board assessed liability for benefits as follows:

75% against the Special Fund and 25% against the employer-appellee, Kentucky Carbon Corporation, since it found that claimant's "disability was not conclusively proven to be the result of such last exposure". (W. 146-147).

An appeal was duly taken by the appellant-Fund to the Pike Circuit Court. (R. 3-8). The Pike Circuit Court affirmed the Opinion and Award of the Board, finding that the uncontradicted evidence reflected that claimant worked for more than one coal company as an underground coal miner. The Circuit Court concluded as a matter of law that where an employee works for more than one coal company and the employers and their mines are non-resident, except the last employer, there is multiple exposure within the meaning of Chapter 342 of the Kentucky Revised Statutes and, hence, the Fund's liability would be on the basis of 75-25%. (R. 15-16).

This appeal by the Fund followed. The question of whether claimant is disabled and entitled to benefits is not involved in this appeal.

ARGUMENT

- I. THE BOARD AND CIRCUIT COURT DID NOT ERR IN ASSESSING PAYMENT FOR 75% DISABILITY BENEFITS AGAINST THE SPECIAL FUND WHERE A CLAIMANT FOR COAL WORKER'S PNEUMOCONIOSIS BENEFITS HAS WORKED FOR MORE THAN ONE COAL COMPANY AND THE EMPLOYER AND ITS MINE IS A NON-RESIDENT EXCEPT THE LAST EMPLOYER, AND WHERE THE EVIDENCE AS FOUND BY THE BOARD SHOWS THAT CLAIMANT'S COAL WORKER'S PNEUMOCONIOSIS WAS NOT CONCLUSIVELY PROVEN TO BE THE RESULT OF HIS LAST EMPLOYMENT WITH THE RESIDENT EMPLOYER.

This case is governed by the provisions of KRS 342.316 (13) (a), which provides:

[(13) (a) The employer liable for compensation for occupational diseases, other than silicosis or any other compensable pneumoconiosis, which developed to the point of disablement only after an exposure of five or more years, or for silicosis and any other compensable pneumoconiosis, shall be the employer in whose employment the employe was last exposed to the hazard of such occupational disease. In those cases where disability or death are not conclusively proven to be the result of such last exposure all compensation shall be paid out of the Special Fund for all claims filed prior to January 1, 1973; and 75 percent shall be paid by the Special Fund and 25 percent by the employer for all claims filed thereafter. In all other cases of occupational diseases, other than silicosis or any other compensable pneu-

moconiosis, which developed to the point of disablement only after an exposure of five or more years, or for silicosis and any other compensable pneumoconiosis, the compensation for disability or death due to such diseases shall be paid jointly by the employer and the Special Fund, and the employer shall be liable for sixty percent of the compensation due and the Special Fund shall be liable for forty percent of the compensation due. Provided, however, that when there is a joint award against the carrier or self-insured employer and the Special Fund under this section, all of the compensation awarded shall be paid from the Special Fund and the Special Fund shall be reimbursed by the carrier or self-insured employer on a quarterly basis and under such regulations as the Board may provide for such purpose.]

This Statute is the only section of Chapter 342 of the Kentucky Revised Statutes which specifically imposes a 60% liability on an employer. In a silicosis and any other compensable pneumoconiosis case, disability must be conclusively proven to be the result of a claimant's last exposure before an employer can be held liable for payment of 60% of the compensation due. In such cases where disability or death are not conclusively proven to be the result of the last exposure, 75% of the compensation is to be paid by the Special Fund and 25% by the employer.

The lay and medical evidence in the record supports the finding by the Board that claimant's

disease was not conclusively proven to be the result of his last exposure with the appellee, Kentucky Carbon Corporation. Claimant testified that while working for the Buchanan County Coal Corporation for twenty-five years, he was exposed to and breathed coal dust. He also testified that during the last six years of employment with Kentucky Carbon Corporation, he breathed coal dust. The physicians who found claimant to have pneumoconiosis were of the opinion that the disease and claimant's disability resulted from his entire mining experience or both employments.

The general rule is that Findings of Fact of the Board will not be disturbed where there is reliable, probative and credible evidence in the record upon which to base such a Finding of Fact. *Crib Diaper Service v. Stanifer*, (Ky.) 436 S.W.2d 501. In the present case, there is uncontroverted evidence to support the Board's Finding of Fact that claimant's disability was not conclusively proven to be the result of his last exposure. The Fund does not contest or discuss this issue in its brief.

Rather, the Fund urges this Court to preempt the function of the Legislature and, in effect, insert the requirement in Chapter 342 of Kentucky Revised Statutes that a claimant for silicosis or pneumoconiosis have injurious exposure for more than one coal company in the State of Kentucky before the Fund could be held responsible for 75% of the

benefits. The Legislature could have easily inserted such a requirement in KRS 342.316 (13) (a) but obviously chose not to do so. Likewise, the Legislature could have re-enacted a provision similar to KRS 342.316 (4) (repealed effective January 1, 1973), requiring two years of exposure in Kentucky prior to disability or death or a Statute which would have provided for 60% liability on an employer where a claimant had only previously worked for a non-resident employer. However, it has not done so to date.

In the case of *Inland Steel Company v. E. H. Terry*, (Ky.), 464 S.W.2d 284, this Court construed KRS 342.316 (4) as requiring continuous and substantially uninterrupted two years exposure to the hazards of silicosis in Kentucky prior to disability. Prior to *Terry*, *supra*, this section was used to prevent out-of-State claimants from working in Kentucky for less than two years and recovering benefits. The *Terry* decision made exposure for two years an absolute requirement for Kentucky and out-of-State claimants alike.

However, the provisions of KRS 342.316 (4) are not applicable in this case for the following reasons:

- (1) It was repealed effective January 1, 1973;

- (2) It would not be applicable under the rationale in *Terry*, *supra* since claimant worked for Kentucky Carbon Corporation his last six years of

employment. Thus, the provisions or purpose of this former Statute cannot in any way be read into any portion of Chapter 342, or specifically KRS 342.316 (13) (a).

The Fund argues that KRS 342.316 (13) (a) imposes an unfair burden on intra state self-insurers for coal worker's pneumoconiosis but no facts or evidence to support this contention are contained in the record. Even if such is the case, that is a matter for the Legislature to correct by Statute. The Fund further contends that self-insurers are assessed an increased amount to cover other States' compensation liability as the result of cases like the one at Bar, but, once again, the record contains no evidence to support this contention.

The Fund also contends that unless its position is sustained that Kentucky will be subject to claims of migrant silicosis victims. Once again, there is no evidence in the record to support this contention. Rather, in this writer's opinion, since the repeal of KRS 342.316 (4), January 1, 1973, Federal Black Lung benefits and equal or higher silicosis benefits in neighboring States have prevented such claims. Certainly Isaac Lester was not a migrant silicosis claimant. He had worked for the appellee, Kentucky Carbon Corporation, since 1968.

The above contentions of the Fund are not relevant to the real issue in this case. The Fund is

requesting this Court to impose a 60% liability on the appellee-employer, Kentucky Carbon Corporation, where there is no statutory authority to do so, and where the evidence reflects that claimant's disability was not conclusively proven to be the result of his last exposure with appellee. This finding by the Board was supported by both the lay and medical evidence. This appellee contends that such an imposition of 60% liability can only be achieved by the Legislature rather than under the existing provision of Chapter 342 of the Kentucky Revised Statutes.

CONCLUSION

For the above stated reasons, the Opinion and Award of the Board and Judgment of the Circuit Court should be affirmed and the appeal of the Fund dismissed.

Respectfully submitted,

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